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IN THE SUPREME COURT OF THE UNITED STATES

(2)

No. 00 A 504

GEORGE W. BUSH AND RICHARD CHENEY,
Applicants,

v.

ALBERT GORE, JR., ET AL.,
Respondents.

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On Emergency Application For A Stay Of Enforcement
Of the Judgment Below Pending the Filing and
Disposition Of A Petition For A Writ Of Certiorari
To The Supreme Court of Florida

OPPOSITION OF RESPONDENT ALBERT GORE, JR. TO EMERGENCY MOTION FOR A STAY PENDING CERTIORARI

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OPPOSITION OF RESPONDENT ALBERT GORE, JR. TO EMERGENCY APPLICATION FOR A STAY PENDING CERTIORARI

Applicants' request for a stay makes a remarkable claim: for the ostensible purpose of advancing the interests of voters, applicants urgently request this Court to *stop the counting of votes*. Their surprising assertion is that a candidate for public office can be irreparably harmed by the process of discerning and tabulating the will of the voters. This suggestion is contrary to established law, the U.S. Constitution, and basic principles of democracy. The application should be denied because applicants have no cognizable legal interest that will be harmed by that count, because a halt in the vote-count process can serve

only to delay ultimate resolution of the election contest, and because their underlying legal claims lack merit.

Against this background, it is not surprising that applicants have failed to make out *any* of the showings necessary to justify such extraordinary relief. *First*, they offer absolutely no credible claim of irreparable harm from the mere judicial counting of previously uncounted ballots. In fact, the only harm alleged by applicants is their fear that, if the count is halted, they somehow will not be able to benefit from the safe harbor of 3 U.S.C. § 5 should they ultimately prevail in the contest action. But that argument is manifestly wrong. Governor Bush can benefit from the safe harbor only if he ultimately prevails in the contest by December 12; yet staying the vote-count can do literally nothing to advance, and can only impede, the expeditious resolution of the contest. Applicants have thus failed to demonstrate any irreparable injury that they will suffer from the continued counting of ballots, and they therefore cannot meet the threshold requirement for this Court's intervention at this stage of the proceedings.

Granting the stay, by contrast, would cause irreparable harm both to respondents and to the public interest. Halting the count of votes until the case has been disposed of by this Court would make it virtually impossible for the Florida courts to complete the review of ballots by December 12, gravely handicapping Vice President Gore's prospects of benefitting from the safe harbor provided by 3 U.S.C. § 5. As a consequence, Gov. Bush proposes a grossly inequitable asymmetry: granting a stay of the vote count would have no bearing on his ability to benefit from the safe harbor, but would substantially undercut Vice President

Gore's hope of invoking the provision. Denying the stay application, in contrast, would avoid those dangers while imposing no injury on applicants; it would leave the status quo intact, giving this Court an opportunity to address the merits.[1]

Second, the public interest weighs strongly against interfering with a state supreme court's decision interpreting state law, because "[a]s a general rule, this Court defers to a state court's interpretation of state statute." *Bush* v. *Palm Beach County Canvassing Board*, No. 00-836 (Dec. 4, 2000), slip op. 4. It would be extraordinary for this Court to enter preliminary relief suspending the Florida Supreme Court's order based on that court's interpretation of state law, especially where that court carefully explained how its holding followed from Florida statutes and prior Florida decisions. And that is especially so because this Court has not yet determined "the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power,'" or the degree to which 3 U.S.C. § 5 imposes any limit on the state supreme court's authority. *Bush*, slip op. 5-6 (citation omitted).

A stay would also undermine the public interest by imposing enormous burdens and disruption on overworked public officials in Florida. The Florida Supreme Court noted the extraordinary effort made by public servants in the State during the last month (see slip op. 39 n.22), and over the last 18 hours public employees across the State have already made Herculean efforts to complete the expeditious judicial count ordered by the Florida Supreme

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[1]Of course, these considerations suggest that, if the Court believed that review of this case were appropriate, it should greatly expedite its consideration of the matter.

Court. To suddenly stay those efforts, only to restart them if this Court were to deny review or affirm the judgment below, would seriously disserve the public interest.

Third, applicants have no substantial likelihood of success on the merits of the issues presented in the application; the federal claims would not warrant relief in any event. The record in this case makes clear that the Florida Supreme Court took to heart the concerns underlying this Court's decision in *Bush* v. *Palm Beach County Canvassing Board*, *supra*, and carefully avoided reliance on any authority other than statutes enacted by the Florida Legislature. The Court likewise carefully explained how its conclusions flowed from prior cases construing those statutes. And the miscellany of other constitutional issues raised by applicants also lack substance. For all of these reasons, the application for a stay should be denied.

STATEMENT

1. Florida's election law establishes two distinct phases for the resolution of disputes regarding the outcome of an election. The first phase runs from election day through the certification of the results of the election. It involves the reports of county canvassing boards to the Secretary of State and Elections Canvassing Commission, and the resolution by the county canvassing boards of any protests filed pursuant to Fla. Stat. § 102.166. This aspect of Florida's election law was before this Court in *Bush* v. *Palm Beach County Canvassing Board*, *supra*.

The second, post-certification phase for resolution of election disputes is the election contest action created by the Legislature in Fla. Stat. § 102.168. That law provides that "the

certification of election * * * of any person to office * * * may be contested in the circuit court by any unsuccessful candidate for such office * * * or by any elector qualified to vote in the election related to such candidacy." One of the grounds for contesting an election is the "rejection of a number of legal votes sufficient to change or place in doubt the result of election." Section 102.168(3)(c). The Legislature provided courts with broad authority both to investigate claims in contest actions and to fashion relief:

> The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Section 102.168(8).

2. On November 27, 2000, following the certification of Gov. Bush as the winner of the Presidential election in Florida, respondent Gore commenced this election contest action under Section 102.168 in Leon County Circuit Court. The complaint raised five claims:

- it challenged the rejection of 215 net legal votes for respondent Gore identified by the Palm Beach County Canvassing Board that had been excluded from the certified vote totals;
- it challenged the rejection of 168 net legal votes for Vice President Gore identified by the Miami-Dade County Canvassing Board also excluded from the certified vote totals;

— it challenged the inclusion in the certified totals of the election night returns from Nassau County in place of the machine recount tabulation required to be used to determine the certified totals by Fla. Stat. § 102.141;

— it argued that the court should review approximately 9000 Miami-Dade County ballots that were not counted by the machines, because – among other reasons – review of approximately 2000 similar ballots by the county canvassing board yielded nearly 400 legal votes; and

— it challenged the rejection of 3300 legal votes in Palm Beach County during the county canvassing board's manual recount.

3. Following a two-day trial, the circuit court entered judgment for applicants and the other defendants on all claims. Three of the circuit court's determinations were relevant to its refusal even to examine the 9000 Miami-Dade County ballots that were introduced into evidence during the trial. First, the court held that the ballots should not be reviewed because the Miami-Dade County Canvassing Board did not abuse its discretion in terminating its manual recount pursuant to Section 102.166. Tr. of Ruling, Sauls, J. (Dec. 3, 2000) at 10. Second, the court held that respondent Gore was required to establish a "reasonable probability that the results of the election would have been changed" before the court could review the ballots and that respondent Gore had failed to carry that burden. *Id.* at 9. And third, the court held that in an election contest action, the court may not review only the contested ballots but rather must review all ballots cast or no ballots at all. *Id.* at 12.

4. The Florida Supreme Court affirmed in part and reversed in part. The court affirmed the judgment regarding both the ballots from Nassau County and the rejection of ballots by the Palm Beach County canvassing board. Slip op. 33, 35. The court reversed, however, as to the excluded ballots from Palm Beach and Miami, holding that valid ballots may not be disregarded in an election contest simply because they were not identified prior to the close of the county certification process. Slip op. 35. Most significant for present purposes, the court also held, not only that respondent is "entitled to a manual count of the Miami-Dade County undervote," but also that the Florida Election Code required "a counting of the legal votes contained within the undervotes in all counties where the undervote has not been subjected to a manual tabulation." Slip op. 2.; see *id.* at 28-32, 38-40.

ARGUMENT

THE APPLICATION FOR A STAY PENDING CERTIORARI SHOULD BE DENIED

The factors governing the issuance of a stay are well-settled: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 689-690 (7th ed. 1993). Likelihood of success on the merits in the context of an application to stay the mandate of a lower court turns on whether there is a "reasonable probability" that four Justices will vote to grant certiorari and a "significant possibility" that a majority of the Court will reverse on the

merits. See, *e.g.*, *Curry* v. *Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying application for stay in elections matter).

None of these factors weighs in favor of applicants here. To the contrary, considerations of irreparable injury and the balance of equities weigh overwhelmingly against issuance of the stay.

A. Applicants Will Not Suffer Irreparable Injury In The Absence Of A Stay

Demonstrating irreparable injury is essential to applicants' request for a stay: "An applicant's likelihood of success on the merits need not be considered, * * * if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 690. Applicants treat this requirement, however, as a brief and rather embarrassed afterthought to their application. See Stay App. 39-41. As we understand it – and there are parts of applicants' argument that we find confusing – applicants appear to assert that they will suffer irreparable injury unless the count of ballots is stopped immediately because (1) under 3 U.S.C. § 5, a State's disposition of controversies regarding the selection of presidential electors is "conclusive" only if those controversies are resolved prior to December 12; (2) if the vote-count goes forward, the current contest may not be completed by that date; and (3) Governor Bush, if he prevails in the contest action after December 12, will lose the presumption of the § 5 safe harbor. See Stay App. 39-40.

With all respect, this argument is wholly insubstantial. Even if Governor Bush is correct in all of his assertions – and in his further argument that the election contest is

somehow "tainted by the Florida Supreme Court's unauthorized and unlawful rewrite of the legislative structure" (Stay App. 40), a point that we address below – a stay would be *completely* irrelevant to his claimed injury. Governor Bush can achieve his objective of a conclusive resolution to this dispute by December 12 in only one of two ways: (1) the count can go forward and the courts can enter a final judgment by December 12, or (2) this Court can grant review and determine that Governor Bush is entitled to prevail in the contest by that date. A stay of the count obviously does nothing to advance either of those goals, and thus does literally nothing to avoid the irreparable injury of which Governor Bush complains.

In this respect, it is important to focus on the particular action ordered by the Florida Supreme Court and the particular relief sought by applicants. That court ordered the review of specified ballots and the adjustment of the certified vote totals in light of that count – a count the outcome of which will not be known until it is complete. Of course, if that review does shift the vote totals in respondent's favor, the injury to applicants will not be the least bit irreparable: "There will be time enough for [applicants] to present his constitutional claim" to this Court "if and when" the threatened harm comes about at the entry of final judgment in the contest proceeding. *Deaver* v. *United States*, 483 U.S. 1301, 1303 (1987) (Rehnquist, C.J., in chambers).

It may be added that applicants do not, and could not, make any claim that the process of counting ballots causes him injury in any cognizable way. After all, applicants retain their ability to obtain full review of all of their constitutional claims if the count ultimately goes against them. See, *e.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 26 (1971) (in

case involving election for U.S. Senator, reversing injunction against recount that was based on alleged irreparable injury of interfering with Senate's ability to judge elections and returns, explaining that "[i]t would be no more than speculation to assume that the Indiana recount procedure would impair such an independent evaluation by the Senate"); *Perez v. Edwards*, 336 So. 2d 1072 (La. App. 1976) (holding that candidate could not establish irreparable injury from casting and counting of ballots because any injury can be redressed by subsequent holding that underlying authorizing provisions are unconstitutional); *Grand Rapids City Clerk v. Judge of Superior Court*, 115 N.W.2d 112 (Mich. 1962) (refusing to issue injunction against election proceedings that would interfere with completion on fixed schedule and where effective relief would subsequently be available). As a consequence, they simply do not face any cognizable injury at this point.

B. Any Injury Applicants Might Suffer Is Sharply Outweighed By The Irreparable Injury To Respondent Gore From Issuance Of A Stay By This Court

A stay thus is neither necessary nor sufficient to protect applicants against irreparable harm; entry of a stay would have no bearing at all on Gov. Bush's ability to take advantage of the 3 U.S.C. § 5 safe harbor. What a stay would do, of course, is prevent Vice President Gore from *ever* gaining the benefit of the Section 5 presumption. A stay would essentially ensure that if this Court either denies review or affirms the decision below – even prior to the Section 5 deadline – the counting of the ballots would push a "final determination" well beyond that date. That means that Governor Bush could gain the benefit of Section 5 if this Court acted quickly, but that Vice President Gore could not, even if this Court ultimately affirmed the decision below. This result would turn the purpose of a stay application on its

head: rather than "temporarily suspend[ing] judicial alteration of the status quo" to permit the Court to exercise jurisdiction over proper federal claims, see *Turner Broad. Sys.* v. *FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers), the grant of a stay here would gratuitously disadvantage one litigant for no permissible purpose.

If, on the other hand, the counting is allowed to proceed, both parties will have an equal opportunity to obtain protection under Section 5, with the winner depending upon both the outcome of the counting and the outcome of any further proceedings in this Court. Such a decision does not impose any irreparable injury whatsoever on Governor Bush, and it fairly balances the equities among the parties.

C. The Public Interest Weighs Strongly Against A Stay

Finally, the rights of third parties and the public interest both weigh strongly against applicants at this juncture. The judicial review of ballots currently underway, which this application seeks to halt, has been commenced to vindicate the constitutional right to vote of those citizens who cast votes that might not otherwise have been properly tabulated. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1963) (citizens have constitutionally protected right to have their votes counted); *United States* v. *Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution is the right of qualified voters within a state to cast their ballots and have them counted."); cf. *United States* v. *Mosley*, 238 U.S. 383, 386 (1915) (it is "equally unquestionable that the right to have one's vote counted is as open to protection * * * as the right to put a ballot in a box"). The public also has a definite interest in the effectuation of all legal procedures in place under

Florida law to determine the rightful winner of Florida's electoral votes in the presidential election.

Moreover, the Florida Supreme Court has determined that Florida law requires judicial tabulation of uncounted ballots. That determination is entitled to considerable deference by this Court. Indeed, it may be disturbed only if this Court finds a basis in federal law for doing so. Yet, as we explain below in more detail, the two grounds identified by this Court in *Bush* are manifestly inapplicable here for two separate reasons. To begin with, this Court in *Bush* took pains to make clear that it was not reaching the federal questions in that case. Surely it would not be appropriate to upset the determination of the Florida Supreme Court by affording interim relief here – with the drastic consequences just discussed for the balance of the equities among the parties – when this Court in *Bush* did not even address the questions presented in that case. Slip op. 6. Second, recognizing the potential concerns articulated by this Court in *Bush*, the Florida Supreme Court exercised great care to ensure that its decision was firmly rooted both in statutes enacted by the Legislature and in longstanding interpretations of those statutes. See pages 13-18, *infra*. That counsels great restraint in interfering with the Florida Supreme Court's interpretation of Florida law.

D. Applicants Cannot Establish A Likelihood Of Success On The Merits

Because applicants can establish neither irreparable injury nor a convincing case on the balance of harms, it is unnecessary at this time for the Court to address the likelihood of success on the merits of applicants' claims. Beyond that, however, the federal claims they raise would not warrant relief in any event.

1. In its opinion in *Bush*, this Court quoted *McPherson* v. *Blacker*, 146 U.S. 1 (1892), but did not address "the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, 'circumscribe the legislative power.'" Slip op. 5. Because the Court was "unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, §1, cl. 2," it "decline[d] at this time to review the federal questions asserted to be present." Slip op. 7, 6. Instead, the Court vacated and remanded for clarification of the grounds of the Florida Supreme Court's decision.

The present case is totally different from *Bush*. There is no indication whatsoever in the lower court's opinion that it "saw the Florida Constitution as circumscribing the legislature's authority" under the federal Constitution. Indeed, the Florida Supreme Court clearly recognized the limitations imposed by Article II -- it expressly acknowledged them at the outset of its opinion. Slip op. 5 ("These statutes established by the legislature govern our decision today"). Accordingly, there is no federal question and no basis for reversal.

The only mention of the Florida Constitution in the Florida Supreme Court's opinion occurs in connection with that court's assertion of jurisdiction, noting that the parties had agreed that the Florida court's assertion of jurisdiction did not run afoul of Article II. Slip op. 1 & n.1. Although applicants repudiated their concession twenty-four hours after it was made, the initial concession was a sensible one: it is clear that there is no Article II issue here.

The Florida Legislature re-enacted the contest statute in 1999 against the settled background rule that decisions of circuit courts in contest actions are subject to appellate

review. See, *e.g.*, *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla.1998); *Harden v. Garrett*, 483 So. 2d 409 (Fla. 1985); *Bolden v. Otter*, 452 So.2d 564 (Fla. 1984); *McPherson v. Flynn*, 397 So. 2d 665 (Fla. 1981). "It is an elementary principle of statutory construction that in determining the effect of a later enacted statute, courts are required to assume that the Legislature passed the latter statute with knowledge of the prior existing laws." *Romero* v. *Shadywood Villa Homeowners Ass'n*, 657 So.2d 1193, 1195-96 (Fla.3d Dist Ct. App. 1995). It therefore is entirely logical to suppose that in referring to the "circuit court" in Section 102.168, the legislature intended to encompass the ordinary accouterments of appellate review of circuit court decisions. Thus, the statute itself supplies the necessary authority for review here.

Moreover, even if the Florida Supreme Court's authority was thought to stem from the Florida Constitution, not the statute, exercise of that authority still would not violate Article II. The threshold inquiry under Article II is whether the state Constitution "circumscrib[ed] the legislature's authority," and here the application of the Florida Constitution must be fully consistent with Article II because there is every indication that the Legislature intended to provide appellate review in contest actions, not eliminate it. Even applicants do not try to explain why the legislature would want to endow a single circuit judge with final authority to decide these cases. Instead, all indications are that the legislature intended this statute to be governed by the settled principle of Florida law that the state supreme court has appellate jurisdiction over all matters determined in the lower courts unless the legislature precludes such review. See, *e.g.*, *Leanard* v. *State*, 760 So.2d 114, 118

(Fla. 2000). That, of course, is a principle with which the Florida legislature is quite familiar.

For example, suppose that the Legislature had enacted a provision stating: "To promote expeditious resolution of election disputes, there shall be no appellate review of the decisions of circuit courts in contest actions." If the Florida Supreme Court had held that provision invalid under the Florida Constitution, an issue would then arise under Article II regarding the validity of the provision for contests of Presidential elections. But here, where the constitutional provision for appellate review supplements the Legislature's scheme -- much like judicial rules of procedure or evidence or principles of statutory construction -- and does not invalidate a choice made by the Legislature, the principle set forth in *McPherson* is not implicated. See 146 U.S. at 39-40; see also *id.* at 24-26.

2. Applicants also argue (at 23) that the decision below violates Article II for the separate reason that the Florida Supreme Court "substituted its judgment for that of the legislature" and "rewr[ote] th[e] statutory scheme" governing the appointment of presidential electors in a variety of different respects. Again, applicants make no plausible claim that Article II has been violated.

To begin with, this contention moves well beyond the sort of Article II claim that the Court hypothesized in *Bush*. There, the Court could not tell the basis for the Florida Supreme Court's ruling and sought clarification. If the Florida Supreme Court explained that it had relied upon the Florida Constitution, then this Court would proceed to assess the permissibility of that reliance under Article II.

Here, the Florida Supreme Court's opinion makes clear that it did not rely upon the Florida Constitution in construing the election law. See, *e.g.*, slip op. 5-6. The court based its interpretation on conventional tools of statutory construction, including relevant precedents; in other words, it engaged in routine statutory interpretation.

Applicants' argument here is thus either that the Florida Supreme Court misrepresented the basis for its decision – that the court said it was interpreting Florida statutory law but actually was not – or that Florida's highest court erred in interpreting Florida law. Either contention is squarely inconsistent with the "general rule" that "this Court defers to a state court's interpretation of state law." *Bush*, slip op. 4. Were this Court to adopt applicants' view of Article II, it would be required to second-guess every state law ruling by a state court to determine whether the lower court was attempting to disguise some other basis for decision or had just gotten the state law wrong.

Finally, as this Court is well aware, the process of statutory construction is the process of determining how to resolve issues that are not expressly addressed in the language of the statute. But applicants takes the position that Article II bars a court from engaging in this routine process: if an issue is not addressed in the language of the statute or in a prior decision that is precisely on point, then the court has engaged in "judicial meddling" or "usurpation of [the Legislature's] constitutionally delegated power." Nothing in Article II so limits the courts' authority, at least absent a specific limitation enacted by the legislature, and there is no such limitation here. Indeed, the fact that these provisions apply broadly to all elections confirms the Legislature's intent that courts exercise their usual role.

A discussion of the particular state law issues cited by applicants confirms that the decision below is a routine example of statutory construction that is entirely consistent with Article II, and that applicants' claims are nothing more than an attempt to reconsider these state law issues. Significantly, despite the division on the court below with respect to the relief granted, there was significant consensus with respect to the questions of statutory interpretation: six of the seven justices agreed on the statutory interpretation issues. Applicants' contentions before this Court consist principally of generalized assertions with little in the way of support.

First, applicants claim that the Section 102.168 contest action does not apply to Presidential elections. However, as the Florida Supreme Court explained (slip op. 6 n.7), applicant Bush, the Florida Legislature, and the Florida Secretary of State all took the position before that court that the contest action was available. Indeed, applicant Bush himself filed a third party complaint in the circuit court in this case invoking Section 102.168 with respect to the Presidential election.[2]

Second, applicants assert (Stay App. 26) that the court below "essentially overruled" two subsections of Section 102.166 by ordering a recount of less than all of the ballots cast. However, as the Florida Supreme Court explained, the Section 102.166 protest remedy is entirely separate from the Section 102.168 election contest remedy. Slip op. 13; see also id. at 61 (Harding and Shaw, JJ., dissenting) (agreeing that the two remedies are separate). And

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[2]The single case cited by applicants – *Fladell* v. *Florida Elections Canvassing Comm'n* – was vacated by the Florida Supreme Court, which expressly held that "the Court's rulings thereon are a nullity." See *Fladell* v. *Florida Elections Canvassing Comm'n*, Nos. 00-2372 & 00-2376, slip op. 4 (Fla. Sup. Ct. Dec. 1, 2000).

whatever the restrictions on the county canvassing boards' authority under Section 102.166, the Legislature granted the courts extraordinarily broad remedial authority in contest actions (see Section 102.168(8)), and it is that authority that is the basis for the determination below.

Third, contrary to applicants' contention (at 26), the court below did not rely on the prior opinion that this Court vacated in *Bush*. It merely pointed out that a canvassing board's failure to complete the recount by the date specified in the court's opinion did not forever bar the inclusion in the vote totals of any legal votes identified in that recount. Slip op. 34-35. Applicants' reference (at 26) to the Broward County votes is mystifying because the counting of those votes was not an issue in the court below.

Fourth -- and somewhat inconsistently – applicants (at 27) attack the Florida Supreme Court for refusing to go beyond the statutory standard for a legal vote and hold that indented ballots may never constitute legal votes. Here, the court's opinion simply recognizes the statutory test; it is difficult to understand how that could possibly violate Article II.

3. Applicants also assert (at 29-34) that the Florida Supreme Court's interpretations of Florida law constitute the application of "laws [not] enacted prior to the day fixed for the appointment of the electors" that will deprive Florida's electors of the protection of 3 U.S.C. § 5. Again, however, each of applicants' claims is just an attempt to revisit the Florida Supreme Court's interpretation of Florida law.

First, applicants again argue (at 30-31) that the Florida Supreme Court's decision curbs the discretion of canvassing boards. As the lower court held, however, canvassing boards exercise their authority under the protest provision, Section 102.166; the case now

before the Court involves an entirely separate remedy, a contest action under Section 102.168. In *Broward County Canvassing Board* v. *Hogan*, 607 So.2d 5087 (Fla. Dist. Ct. App. 1992), upon which applicants rely, the plaintiff's claim was that the canvassing board should have conducted a recount under Section 102.166; the plaintiff did not assert a claim to relief under the specific grounds set forth in the contest statute as respondent Gore did here under Section 102.168(3)(c).

Second, applicants again attack (at 31) the Florida court's definition of a legal vote. They seem to argue that the Florida Supreme Court was obligated to provide a definition more specific than the one set forth in the statute. But standards such as "intent" are well known in the law and nothing in 3 U.S.C. § 5 imposed an obligation of greater specificity.[3]

4. Applicants also have not shown the requisite probability of success on the merits of their equal protection claim. The decision of the court below does not present either of the situations that applicants have argued would raise concerns under the Equal Protection Clause.

To begin with, in their brief below, applicants argued primarily that, "[i]n a contest of a statewide election, a statewide recount is required by the Equal Protection Clause." See Amended Brief of Applicant Bush in *Gore v. Harris*, Fl. S. Ct. No. SC00-2431 at 44. The

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[3]Applicants point to the 1990 Palm Beach guidelines and other alleged definitions of legal votes. But the key question is whether those definitions are consistent with the statutory standard prescribed by the Legislature; no one would assert that simply because a standard had been promulgated by a canvassing board prior to the election it must be applied even if it violates the statute. And the relevant circuit court held that the Palm Beach standards did violate the statutory test. *Florida Democratic Party* v. *Palm Beach County Canvassing Board*, No. CL00-11078AB (Fla 15th Jud. Cir. Nov. 15, 2000).

decision of the Florida Supreme Court, of course, orders a statewide manual count of undervotes, see slip op. at 16-20, so this equal protection claim is not presented.

Faced with the loss of that argument, applicants now argue only that "the necessarily disparate manual recount" ordered by the Florida Supreme Court raises equal protection problems. See Stay App. at 35. But the premise of this argument simply does not obtain here because the Florida Court has ordered that a uniform, statewide standard, that required by the legislature, be used in counting the undervotes. See slip op. at 23-25 (explaining that, under longstanding interpretations of statutory law, ballots containing a "clear indication of the intent of the voter" constitute "legal votes" that must be counted). Because all the undervotes that will be manually counted will be counted under this same standard, there is nothing to applicants' equal protection claim.

Applicants also argue that Florida cannot treat voters in different counties differently. Stay App. 35. If applicants mean by this to say that every county must use precisely the same methods of tabulation as every other county in the State, they are obviously wrong. As they do in Florida, different counties within States routinely use different equipment and different ballots for the conduct of their elections. This plainly does not systematically "dilute" the votes of particular counties in any way that violates the Equal Protection Clause. The only decision applicants cite in support of their argument, *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), involved incarcerated prisoners who were denied the right to vote altogether based solely on their county of residence. But *O'Brien* stands only for the unremarkable proposition that voters cannot be denied the right to vote solely because of their county of residence.

Indeed, even if the standard articulated by the Florida Supreme Court were interpreted slightly differently in different counties, permitting each county's canvassing board to conduct its portion of a statewide manual recount of undervotes would not work any impermissible discrimination. It would simply facilitate the completion of the count. The need for an orderly process of counting these votes would be sufficient to sustain against Equal Protection challenge the reasonable procedure of permitting each county to apply the standard set out by the Florida Court. See *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983) (with respect to regulation of elections, "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions").

In any event, if the standard set out by the Florida Court is not applied consistently, applicants will have recourse to the Leon County Circuit Court and, on appeal, to the Florida Supreme Court, either of which will be able to eliminate any inconsistency by determining itself which ballots meet the statutory standard.[4]

The decisions cited by applicants are in any event inapposite. Although applicants mention "dilution," the cases they cite, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Roman* v. *Sincock*, 377 U.S. 695 (1964), involve the one-person one-vote principle under which voters from different districts cannot be given votes of unequal "weight." This issue is not presented in an at-large election like the instant one where, although the elections are conducted by individual counties, the winner is determined based on his or her statewide

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[4]And, indeed, Florida statutory law provides that opportunity with regard to any ballots that a candidate believes should not have been counted during a manual recount pursuant to Fla. Stat. 102.166, see App. 36 (complaining about standards used during previous manual recounts). See Fla. Stat. 102.168 (3)(c) (permitting a candidate to contest the inclusion of "illegal votes" in the certified election results).

vote. When the State undertakes procedures to ensure that qualified voters' votes are counted, the previously counted votes are not, of course, "diluted" at all. And, as this Court has previously recognized, manual recount procedures are an ordinary mechanism for ensuring the accuracy of vote-counts in close elections. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25 (1972) ("A recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, § 4.").

5. Nor is there any prospect that applicants will prevail under the Due Process Clause of the Fourteenth Amendment. Applicants appear to argue that the Florida Supreme Court's decision violates the Due Process clause in two ways: first, because it improperly changes the law, and, second, because it requires that the manual recounts occur in the absence of clear standards.

To the extent that applicants' due process argument rests on the claim that the Florida Supreme Court imposed standards for counting the votes that were not in place when the votes were cast, that argument must fail for reasons already discussed above: the law enunciated in the Florida Supreme Court's opinion is the law as it existed on election day and long before it. In fact, this argument is particularly flawed in the due process context. To establish the charge of a constitutionally impermissible retroactive change in the law, applicants would have to demonstrate not simply that the Florida Supreme Court's decision constituted a retrospective change and that the change deprived them of a cognizable liberty or property interest, but also that the change was "arbitrary and irrational." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); see also *id.* at 537 (plurality opinion of O'Connor, J.) (same); *id.* at 556 (Breyer, J.,

dissenting) (same). But applicants allege *none* of the elements of such a claim, for understandable reasons. Not only does the Florida Supreme Court's decision not represent a change in the law, *see supra*, but it would take an exceptional showing of unfair retroactive effect to hold a court decision (as opposed to a legislative enactment) violative of due process: court judgments are normally retrospective in light of their application to the parties to the case, and the Fourteenth Amendment has never been suggested to require otherwise.

Indeed, this Court's decisions reflect the strong presumption, consistent with this Court's understanding of the nature of the judicial act, that judicial rulings (again, in contrast to legislative enactments) must be retrospectively applied to the parties themselves. See, *e.g.*, *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993); see *id.* at 107-08 (Scalia, J., concurring). The appellate decisions on which applicants relies for his assertion that the decision below has impermissible retroactive effect are simply inapposite. In both *Briscoe v. Kusper*, 435 F.2d 1046 (7th Cir. 1970), and *Roe v. Alabama*, 43 F.3d 574 (11th Cir. 1995), election officials retroactively changed an electoral practice on which voters and candidates had relied at the time of the election.

As for applicants' claim that the Florida court's decision did not provide sufficient guidance for its standards to pass due process muster, both the court's decision and the subsequent circuit court actions to implement that decision belie applicants' claim. In its decision, the Florida Supreme Court offered a clear standard – one that has been in place in Florida and countless other states for years: "the standards to be employed is that established by the Legislature in our Election Code which is that the vote shall be counted as a 'legal' vote if there is 'clear indication of the intent of the voter.'" Slip op. 40. The Florida

canvassing boards and courts have long implemented that standard, and vote totals certified in this and many previous elections reflect countless ballots manually recounted under this standard.[5]

The cases applicants cite do not suggest a contrary result. In *Duncan v. Poythress*, 657 F.2d 691 (1981), the Fifth Circuit agreed with the First Circuit that a due process violation could be found where "'the election process reaches the point of patent and fundamental unfairness.'" *Id.* at 703 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)). Of note, both the First and Fifth Circuits explicitly recognized that the circumstances giving rise to a due process violation would have "to go well beyond the ordinary dispute over the counting and marking of ballots," and that precedent established that federal courts would not "enter into the details of the administration of the election." *Id.* The First and Fifth Circuits found a sufficiently flawed electoral process only where the state encouraged voters to proceed by absentee ballot but then retroactively invalidated those ballots, and where it failed entirely to hold an election required by law. *Id.*

Indeed, applicants' arguments that the judgment of the Florida Supreme Court violates due process because it is "in its basic aspect * * * flawed" and permits effectively standardless recounts are nothing more than claims that the contest and recount procedures of Florida's election code, which mirror those that have long existed in one form or another in numerous States are on their face unconstitutional. There is no way of rationalizing their position with the fact that the manual counting of ballots under the identical standard has

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[5] Indeed, under applicants' due process theory, the already certified results must be constitutionally infirm to the extent that they include any ballots manually recounted under Florida's longstanding standard.

been the *rule*, not the exception, in this country for most of the period since its founding. And their argument would have the logical consequence that the entire election in Florida, in which many ballots have been included in the certified totals to date only after manual counting, would have to be declared invalid.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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